Nos. 17-1717 & 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST SOCIETY, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST SOCIETY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PAUL J. ZIDLICKY*
MICHAEL B. BUSCHBACHER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com

Counsel for Amicus Curiae

July 27, 2018

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMCIUS CURIAE*	1
BACKGROUND	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE FOURTH CIRCUIT'S "OFFENDED BYSTANDER" TEST IS CONTRARY TO THIS COURT'S ARTICLE III STANDING DECISIONS AND PRESENTS A CONFLICT AMONG THE CIRCUIT COURTS...	6
A. Article III Requires A Plaintiff To Demonstrate More Than The "Psychological Consequence" Of Observing An Alleged Violation Of Federal Law	6
B. The Fourth Circuit's "Direct Contact" Standard Presents A Conflict Among The Circuits On What Is Required To Establish Standing	10
II. THE DECISION BELOW SQUARELY PRESENTS A CIRCUIT CONFLICT ON THE STANDARDS FOR ASSESSING PUBLIC DISPLAYS UNDER THE ESTABLISHMENT CLAUSE	14
A. The Decision Below Exacerbates A Conflict Concerning The Test For Assessing Public Displays Under The Establishment Clause	15
B. The Decision Below Is Inconsistent With *Van Orden*	18

TABLE OF CONTENTS—continued

Page

C. Review Should Be Granted Because The Decision Below Calls Into Question The Legality Of Numerous Memorials Throughout The Nation 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page

ACLU–NJ v. *Twp. of Wall*, 246 F.3d 258 (3d Cir. 2001) 11

ACLU Neb. Found. v. *City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated on other grounds on reh'g*, 419 F.3d 772 (8th Cir. 2005) 11

ACLU Neb. Found. v. *City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) 17

ACLU of Ky. v. *Grayson Cty.*, 591 F.3d 837 (6th Cir. 2010) 16

Am. Humanist Ass'n v. *Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243 (10th Cir. 2017) 13

Am. Atheists, Inc. v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010) 16

Am. Atheists, Inc. v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) 16

Books v. *City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) 12

Card v. *City of Everett*, 520 F.3d 1009 (9th Cir. 2008) 15

Diamond v. *Charles*, 476 U.S. 54 (1986) 7

Doe v. *Cty. of Montgomery*, 41 F.3d 1156 (7th Cir. 1994) 11, 12

Doremus v. *Bd. of Educ.*, 342 U.S. 429 (1952) 8

Flast v. *Cohen*, 392 U.S. 83 (1968) 7

Foremaster v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989) 12, 13

Freedom From Religion Found., Inc. v. *Obama*, 641 F.3d 803 (7th Cir. 2011) 11

Freedom From Religion Found., Inc. v. *Zielke*, 845 F.2d 1463 (7th Cir. 1988) 12

TABLE OF AUTHORITIES—continued

	Page
Gonzales v. *N. Twp. of Lake Cty., Ind.*, 4 F.3d 1412 (7th Cir. 1993)	12
Hein v. *Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007)	6
Horne v. *Flores*, 557 U.S. 433 (2009)	7
Hunt v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977)	10
Jewish People for the Betterment of Westhampton Beach v. *Vill. of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015)	10
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	14
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	6
Lynch v. *Donnelly*, 465 U.S. 668 (1984)	16
McCreary Cty. v. *ACLU of Ky.*, 545 U.S. 844 (2005)	15
Newdow v. *Lefevre*, 598 F.3d 638 (9th Cir. 2010)	11
Red River Freethinkers v. *City of Fargo*, 764 F.3d 948 (8th Cir. 2014)	17
Saladin v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987)	10
Salazar v. *Buono*, 559 U.S. 700 (2010)	9
Sch. Dist. of Abington Twp. v. *Schempp*, 374 U.S. 203 (1963)	8
Smith v. *Allwright*, 321 U.S. 649 (1944)	20
Staley v. *Harris Cty.*, 461 F.3d 504 (5th Cir. 2006), *dissmissed on other grounds on reh'g*, 485 F.3d 305 (5th Cir. 2007)	17
Staley v. *Harris Cty.*, 485 F.3d 305 (5th Cir. 2007)	17
Suhre v. *Haywood Cty.*, 131 F.3d 1083 (4th Cir. 1997)	7, 12
Trunk v. *City of San Diego*, 629 F.3d 1099 (9th Cir. 2011)	16

TABLE OF AUTHORITIES—continued

Page

Utah Highway Patrol Ass'n v. *Am. Atheists, Inc.*, 565 U.S. 994 (2011) 2

Valley Forge Christian Coll. v. *Americans. United For Separation of Church & State*, 454 U.S. 464 (1982) 8, 9, 11

Van Orden v. *Perry*, 545 U.S. 677 (2005) 4, 14, 16, 18, 19

Vasquez v. *Los Angeles Cty.*, 487 F.3d 1246 (9th Cir. 2007) 12

CONSTITUTION

U.S. Const. amend. I 14

U.S. Const. art. III, § 2 6

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of more than 2,500 local government attorneys who advise towns, cities, and counties across the country. IMLA advises its members on legal challenges facing local governments and advocates for more just and effective municipal law.

This case is of particular concern to local government attorneys nationwide as the Fourth Circuit's decision calls into question all public memorials that can be perceived as conveying a religious meaning, including those in Arlington National Cemetery, and it further complicates one of the most taxing, confusing, and contentious areas of law for local government attorneys. IMLA's interest is *not* the advancement of any particular religious, sectarian, political, or ideological position. Its members hold a great diversity of beliefs about religion and its role in public life as well as how the Constitution should be interpreted in an ever-changing democracy.

What unites IMLA's members is a conviction that clear and predictable rules are preferable to obscure and malleable standards that leave responsible municipal counsel at sea when advising their clients on the proper course of action when long-standing memorials on public land are challenged by individuals

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel for all parties received notice and have consented to the filing of this brief.

who contend that they are offended when they see those displays on public land. IMLA and its members have litigated challenges to cross-shaped monuments and memorials around the country based on this conviction. Unfortunately, lower courts apply differing standards making "the constitutionality of displays of religious imagery on government property anyone's guess." *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 565 U.S. 994, 995 (2011) (Thomas, J., dissenting from denial of certiorari).

IMLA submits that this case presents a compelling vehicle to resolve conflicts and confusion concerning public displays challenged under the Establishment Clause. First, this case affords the Court an opportunity to resolve a conflict, and thereby ensure uniform nationwide standards, about what is required under Article III to demonstrate standing to challenge a public display under the Establishment Clause. Second, this case is an ideal vehicle for the Court to bring clarity, consistency, and predictability to the standards for assessing the legality of public displays under the Establishment Clause.

BACKGROUND

Amicus adopts the background set forth in the two petitions for writ of certiorari, but highlights a number of facts relevant to the Court's decision whether to grant plenary review.

1. The origin of this dispute begins nearly a century ago, in 1925, when the American Legion and a group of bereaved mothers pooled their resources to build a Memorial in honor of the 49 young men from Prince George's County, Maryland, who gave their lives fighting in the First World War. Pet. App. 51a-

55a.[2] Like many veterans' gravestones and monuments erected during this period, the Memorial took the shape of a cross. Because it is a war memorial, the words "valor," "devotion," "courage," and "endurance" are inscribed in bold on the four sides of the Memorial's base. *Id.* at 52a.

2. In 2014, Respondents filed suit challenging the Memorial under the Establishment Clause and seeking its "removal," its "demolition," or its disfigurement through the "removal of the arms" to "form a rectangular block or obelisk." See Plaintiffs' Memorandum of Law in Support of Summary Judgment at 50, Doc. No. 80-1 (May 5, 2015). To support standing, Plaintiffs asserted that they "had unwelcome contact with the Bladensburg Cross," that they feel that it "gives the impression that the state supports and approves of Christianity to the exclusion of other religions and nonreligion," and that they feel "excluded by this governmental message." See *id.* at 2-3. Plaintiffs did not allege they had been subjected to unwelcome religious exercise or forced to assume special burdens to avoid such exercise. Rather, they submitted evidence that they encountered the Memorial while running errands or visiting commercial establishments or friends. Fourth Circuit Joint Appendix ("CA JA"), Doc. No. 26 ¶ 6 (Mr. Lowe); CA JA 25 ¶ 9 (Mr. Edwords: "unwelcome contact" on "several occasions"); CA JA 26 ¶ 10 (Mr. McNeill: "unwelcome contact" "at least four times").

2. The district court held that the Memorial did not violate the Establishment Clause. Applying the three-part *Lemon* test, it held that (i) the purpose of the Memorial was predominantly secular, Pet. App.

---

[2] Citations to the "Pet. App." are to the Petitioner's Appendix in case number 17-1717.

73a-74a, (ii) a reasonable observer would not view the Memorial as having the effect of impermissibly endorsing religion, *id.* at 74a-75a, and (iii) the government's maintenance of the Memorial on a highway median did not implicate any of the evils against which *Lemon*'s third prong protects, *id.* at 77a. The district court also upheld the Memorial under the "legal judgment" test set forth in *Van Orden* v. *Perry*, 545 U.S. 677, 690 (2005). Pet. App. 77a-79a.

3. A panel of the Fourth Circuit reversed. It first concluded that the individual plaintiffs had standing because "they have each regularly encountered the Cross as residents while driving in the area, the Commission caused such injury by displaying the Cross, and the relief sought—enjoining the display of the Cross—would redress their injury." Pet. App. 10a-11a. On the merits, the panel concluded that the Memorial had "the primary effect of endorsing religion and excessively entangles the government in religion." *Id.* at 3a. According to the panel, the "*purported* war memorial breaches the 'wall of separation between Church and State.'" *Id.* at 26a (emphasis added) (quoting *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947)). The panel further noted that it was "not deciding or passing judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses." *Id.* at 29a n.16. Subsequently, the Fourth Circuit denied rehearing en banc, with Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer each writing opinions explaining why rehearing en banc should be granted. *Id.* at 82a-84a, 94a, 95a-96a, 97a-101a.

SUMMARY OF ARGUMENT

This Court should grant the petition because the Fourth Circuit's decision presents two outcome-

determinative issues of federal law that have generated conflicts among the federal courts of appeals concerning questions of surpassing importance. *Amicus* seeks review of those issues because its members have a strong interest in clear, uniform and predictable standards for assessing whether plaintiffs have standing to challenge a public display, and, if so, whether a challenged display violates the Establishment Clause of the First Amendment.

I. The case squarely presents the question of what is required to satisfy standing to challenge a public display under the Establishment Clause. The Fourth Circuit held that personal contact with a public display that offends a passing bystander is sufficient to state a cognizable injury in fact. That standard is irreconcilable with decisions of this Court and conflicts with the Seventh Circuit's more demanding standard for establishing injury in fact under Article III. Indeed, the Fourth, Ninth and Tenth Circuits each have acknowledged that the Seventh Circuit's test conflicts with their standards. This case presents a particularly suitable vehicle for resolving that conflict because, under the Seventh Circuit's test, plaintiffs would have lacked standing because there is no allegation that they altered their conduct in an effort to avoid seeing the Memorial. As a result, plaintiffs here are no different than "offended bystanders" who lack standing to challenge government action that they contend violates the law.

II. Certiorari should be granted to review the decision below because it squarely presents a conflict over the proper standard for assessing whether a public display violates the Establishment Clause. The federal courts of appeals are in disarray regarding the substantive standard that should apply. The Court below adopted a crabbed application of the

Lemon standard; other courts reject *Lemon* in favor of this Court's analysis set forth in more recent decisions such as *Van Orden*. This case provides the Court with an appropriate vehicle to provide a uniform and predictable standard for assessing challenges to public displays under the Establishment Clause. Such a standard would allow government lawyers to provide intelligible advice concerning new displays that have been and may be proposed, and to assess how and whether to defend any challenges to existing displays.

ARGUMENT

I. THE FOURTH CIRCUIT'S "OFFENDED BYSTANDER" TEST IS CONTRARY TO THIS COURT'S ARTICLE III STANDING DECISIONS AND PRESENTS A CONFLICT AMONG THE CIRCUIT COURTS.

A. Article III Requires A Plaintiff To Demonstrate More Than The "Psychological Consequence" Of Observing An Alleged Violation Of Federal Law.

Under Article III, "[t]he judicial Power shall extend to all Cases" and "Controversies." U.S. Const. art. III, § 2. As a result, federal courts must assure themselves that a plaintiff has standing before they can address that plaintiff's claims. To have standing, a plaintiff must establish (1) an injury in fact, (2) a causal connection between the injury and the complained-of conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); see also *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality op.). These core requirements ensure that "the decision to seek review" is not "placed in the hands of 'concerned

bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Rather, a plaintiff must have "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) (emphasis omitted).

1. Plaintiffs sought to satisfy Article III's standing requirement based on their status as "concerned bystanders." They are three individuals and the American Humanist Association ("AHA"), which brought suit on behalf of its individual members. The individual plaintiffs—two of whom are members of AHA—submitted evidence that they have "regularly encountered" the Memorial while driving, believe that it is unconstitutional, and "wish to have no further contact with it." Pet. App. 7a.

In the decision under review, the Fourth Circuit held that the plaintiffs had standing because they had been in "direct contact" with the Memorial. Pet. App. 10a.[3] That analysis was compelled by prior Fourth Circuit precedent holding that a plaintiff can establish standing by showing "unwelcome direct contact" with a challenged display. *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). In adopting that test, the *Suhre* Court rejected the Seventh Circuit's competing test, which requires a showing that a plaintiff must "actually chang[e] his behavior in response to the display." *Id.* at 1087; *id.* at 1088 (rejecting Seventh Circuit's test because "[s]uch an extraordinary showing of injury, while sufficient, is not necessary to support standing to bring an Establishment

---

[3] Plaintiffs do not claim standing as taxpayers under *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Clause claim"). Thus, in the Fourth Circuit, observation of a display to which an individual objects is sufficient to show injury under Article III.

2. The "direct contact" standard is irreconcilable with this Court's requirement that plaintiffs invoke more than the "psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll.* v. *Americans United For Separation of Church & State*, 454 U.S. 464, 485 (1982). *Valley Forge* clarified and reconciled this Court's prior rulings on Establishment Clause standing. Namely, in *Doremus* v. *Board of Education*, 342 U.S. 429, 432 (1952), this Court held that plaintiffs lacked standing to challenge a statute that required the reading of Old Testament verses at the opening of each school day. In *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 224 (1963), this Court held that the plaintiffs had standing to challenge a similar policy. The plaintiffs in *Doremus* were the parents of children who had already graduated by the time the appeal was taken to the Supreme Court, whereas the plaintiffs in *Schempp* included both currently enrolled schoolchildren and their parents. *Doremus*, 342 U.S. at 432-33; *Schempp*, 374 U.S. at 224 n.9.

The *Valley Forge* Court explained the line that separated *Schempp* from *Doremus*. Responding to the plaintiffs' argument that under *Schempp* "any person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing," the *Valley Forge* Court ruled that this proposed test was foreclosed by *Doremus* where plaintiffs lacked standing because their children already had graduated. See *Valley Forge*, 454 U.S. at 486 n.22. In contrast, in *Schempp*, plaintiffs had standing because they had suffered injury either because "[1] impressionable

schoolchildren were subjected to unwelcome religious exercises or [2] were forced to assume special burdens to avoid them."[4] *Id.* The plaintiffs lacked standing in *Valley Forge* because they met neither criteria. They were residents of Maryland and Virginia and a non-profit in the District of Columbia who objected to a transfer of Pennsylvania land between the federal government and a religious order—a transfer that they learned about in a press release. *Id.* at 487. Because they were neither subjected to a religious exercise nor forced to assume a special burden to avoid such an exercise, they lacked standing to challenge the transfer of property.

As in *Valley Forge*, plaintiffs in this case base standing on the "psychological consequence" of seeing what they think is a constitutional violation. *Id.* at 485. They do not contend that the Memorial subjects them to unwanted religious exercise; indeed, they are in no sense a captive audience like the schoolchildren in *Schempp*. Nor are they "forced to assume special burdens to avoid" the Memorial. *Id.* at 486 n.22. The three individuals who challenge the Memorial assert instead that they can seek destruction or removal of

---

[4] These criteria are echoed in *Salazar* v. *Buono*, 559 U.S. 700 (2010) (plurality op.). Though the plurality did not reach the question of the standing threshold because of forfeiture rules, *Id.* at 711-12, Justice Scalia in concurrence and Justice Stevens in dissent—together combing for five votes—contested the question of whether the plaintiff was so offended as to be "unable to freely use the land" around a cross-shaped memorial once that memorial was transferred to a private organization. *See id.* at 733 (Scalia, J., concurring); *id.* at 738 n.2 (Stevens, J., dissenting). Justice Stevens said the plaintiff would remain burdened and had standing; Justice Scalia said he would not. *Id.* As in *Valley Forge*, the debate was not whether the plaintiff had observed the display, but if the plaintiff was forced to undertake burdens to avoid the display.

the Memorial because they have seen it while driving on an errand or a social function and they want no further contact with it. CA JA 24-25 ¶ 6, 25 ¶ 9, 26 ¶ 10. Indeed, none of them describes taking any steps to avoid the Memorial, not even adding a minute-long detour.[5]

B. The Fourth Circuit's "Direct Contact" Standard Presents A Conflict Among The Circuits On What Is Required To Establish Standing.

In the lower courts, the standing criteria—especially the requirement that there be an injury-in-fact—have proved "particularly elusive." *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987). As a result, the circuits have adopted conflicting standards for assessing standing to present Establishment Clause challenges to public displays.

1. Several circuits share the Fourth Circuit's view that one need only have "direct contact" with the display to have standing. *E.g.*, *Jewish People for the Betterment of Westhampton Beach* v. *Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) ("We have found standing in the Establishment Clause context for a plaintiff who alleged that he 'was made uncomfortable by direct contact with religious displays.'")

---

[5] For similar reasons, AHA also lacks standing to challenge the Memorial. AHA has not alleged any direct injury from the Memorial, but instead sues on behalf of its members who are Prince George's County residents who have seen the Memorial on occasion and are offended by it. Pet. App. 11a. As a result, AHA must show "its members would otherwise have standing to sue in their own right" and that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Because AHA's members lack standing to sue in their own right, AHA also lacks standing.

(quoting *Cooper* v. *U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009)); *ACLU-NJ* v. *Twp. of Wall*, 246 F.3d 258, 265 (3d Cir. 2001) (recognizing standing when the plaintiff "had personal contact with the display"); *ACLU Neb. Found.* v. *City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004) (requiring "only direct and unwelcome personal contact with the alleged establishment of religion"); *Newdow* v. *Lefevre*, 598 F.3d 638, 642-43 (9th Cir. 2010) (describing the standing threshold as "unwelcome direct contact"). These circuits recognize that *Valley Forge* requires that the class of potential plaintiffs not be infinite, but then adopt an arbitrary restriction, wholly divorced from any theory of cognizable injury in fact. To draw that line, these circuits distinguish *Valley Forge* because the plaintiffs there learned of the transfer of property in a press release and never saw the land parcel at issue. *E.g.*, *City of Plattsmouth*, 358 F.3d at 1029.

2. In contrast, the Seventh Circuit requires that plaintiffs show either that they were a captive audience or took special burdens to avoid the display. *E.g.*, *Doe* v. *Cty. of Montgomery*, 41 F.3d 1156, 1161 (7th Cir. 1994); *Freedom From Religion Found., Inc.* v. *Obama*, 641 F.3d 803, 811 (7th Cir. 2011) (Williams, J., concurring).[6] One is captive to a display when one "*must* come into direct and unwelcome contact with the sign in order to participate in their local government and fulfill their legal obligations." *Doe*, 41 F.3d at 1161 (emphasis added). Plaintiffs in the Seventh Circuit have had standing to challenge displays that stand as a barrier between citizens and

---

[6] These requirements track the injury described in *Valley Forge*, *i.e.*, plaintiffs must be "*subjected* to unwelcome religious exercises or [2] . . . *forced to assume special burdens* to avoid them." 454 U.S. at 486 n.22 (emphases added).

their participation in local government, like a display above a local courthouse entrance or in front of a municipal building. *E.g.*, *id.* at 1158; *Books* v. *City of Elkhart*, 235 F.3d 292, 300-01 (7th Cir. 2000).

In contrast, other circuits do not require a showing that the plaintiffs undertook a burden to avoid the display or had no choice but to confront the display to access government services. Here, plaintiffs assert only that they saw the Memorial while driving, and therefore their claim would be dismissed by the Seventh Circuit for lack of standing. Indeed, the Seventh Circuit did exactly that in *Freedom From Religion Foundation, Inc.* v. *Zielke*, 845 F.2d 1463 (7th Cir. 1988). There, plaintiffs challenged a Ten Commandments monument in a public park. They gave no account of avoiding the park, nor was the monument in front of a courthouse or a city building. *Id.* at 1468. The Seventh Circuit held that this sort of "psychological harm" was insufficient under *Valley Forge*. *Id.* Under that holding, plaintiffs in this case would lack standing because they do not contend that they are in some sense a captive audience or that they must confront the Memorial to conduct public business.

The Fourth, Ninth, and Tenth Circuits have acknowledged this conflict between the standards that they apply to assess Article III standing, and the more-demanding standard applied by the Seventh Circuit. In *Suhre*, the Fourth Circuit rejected the standard set forth by the Seventh Circuit in *Zielke* and *Gonzales* v. *North Township of Lake County, Ind.*, 4 F.3d 1412, 1416 (7th Cir. 1993). *Suhre*, 131 F.3d at 1087-88. Likewise, the Ninth Circuit acknowledged and rejected the Seventh Circuit's standard in *Zielke*. See *Vasquez* v. *Los Angeles Cty.*, 487 F.3d 1246, 1253 n.5 (9th Cir. 2007). Finally, in *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th

Cir. 1989), the Tenth Circuit explained that "[t]he circuit courts have interpreted *Valley Forge* in different ways." *Id.* at 1490.[7] The Tenth Circuit then rejected the Seventh Circuit's approach and embraced the tests adopted by the Sixth and Eleventh Circuits. *Id.* at 1490-91 ("[Plaintiff's] direct personal contact with offensive municipal conduct satisfied *Valley Forge*"); *accord Am. Humanist Ass'n* v. *Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1253 (10th Cir. 2017) (rejecting Seventh Circuit's standard and holding that infrequent contacts are sufficient to establish standing because "an identifiable trifle is enough for standing to fight out a question of principle") (quoting *SCRAP*, 412 U.S. at 689 n.14).

As a result of this conflict, the threshold requirement for invoking the judicial power of federal courts to challenge public displays under the Establishment Clause currently depends on the happenstance of geography. An inconsistent standing threshold uniquely burdens IMLA, an organization of 2,500 local government attorneys who regularly confront the question whether plaintiffs who disagree with a public display will be able to challenge that display in federal court. IMLA therefore respectfully submits that further review is warranted to resolve the circuit split and provide doctrinal clarity.

---

[7] *Foremaster* explained that (i) in two cases involving displays in public parks, "[t]he Seventh Circuit required that a plaintiff allege that a municipality's action offends him and that he has altered his behavior as a consequence of it," but (ii) the Sixth and Eleventh Circuits required "an allegation of direct personal contact with the offensive action alone." 882 F.2d at 1490 (citing Seventh Circuit cases, *Zielke* and *ACLU* v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986)).

II. THE DECISION BELOW SQUARELY PRESENTS A CIRCUIT CONFLICT ON THE STANDARDS FOR ASSESSING PUBLIC DISPLAYS UNDER THE ESTABLISHMENT CLAUSE.

The First Amendment provides that Congress shall make no "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. In *Van Orden* v. *Perry*, this Court upheld a public display of the Ten Commandments in front of the Texas state capital notwithstanding its unquestioned "religious significance." 545 U.S. at 690 (plurality op.); *id.* at 704 (Breyer, J., concurring in judgment). In doing so, this Court declined to apply the three-part test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). See *Van Orden*, 545 U.S. at 686 (plurality op.); *id.* at 703-04 (Breyer, J., concurring in judgment). Instead, the Court highlighted that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious," *id.* at 699 (Breyer, J., concurring in judgment), and that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause," *id.* at 690 (plurality op.).

In the decision below, the Fourth Circuit relied principally upon the *Lemon* test to strike down a 90-plus year old Memorial constructed through private donations and dedicated to forty-nine local soldiers who died in World War I. Pet. App. 97a (Niemeyer, J., dissenting from denial of rehearing) ("The mothers of soldiers who died during World War I and other private citizens in Prince George's County, Maryland, erected a memorial almost 100 years ago commemorating the soldiers' service to the Nation."). The Fourth Circuit concluded that this "*purported* war

memorial," *Id.* at 3a (emphasis added), violated the Establishment Clause because takes the shape of a cross and is located on public land. *Id.*

Review should be granted because the Fourth Circuit's decision (i) deepens a conflict among the federal circuits concerning the legal standard for deciding whether a public display violates the Establishment Clause, (ii) is inconsistent with this Court's decision in *Van Orden*, and (iii) puts at risk similar monuments located throughout the Nation.

A. The Decision Below Exacerbates A Conflict Concerning The Test For Assessing Public Displays Under The Establishment Clause.

This Court should grant review to establish a nation-wide, uniform standard in place of the divergent tests being used by lower courts to evaluate the constitutionality of religious displays on public land. Courts are currently "[c]onfounded by the ten individual opinions in [*McCreary* and *Van Orden*]" and "have described the current state of the law as both 'Establishment Clause purgatory,' and 'Limbo.'" See *Card* v. *City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (citation omitted). This case is an ideal vehicle to provide needed guidance to aid local governments struggling to predict what test governs challenges to public displays.

1. Several circuits—including the Second, Sixth, and Tenth Circuits—currently follow analytical frameworks similar to the Fourth Circuit's in this case. Sometimes referred to as applying the "*Lemon*/Endorsement test," these circuit courts apply the three-pronged approach in *Lemon* while giving "due consideration" to other tests articulated by this Court in *McCreary County* v. *ACLU of Kentucky*, 545 U.S.

844 (2005), *Van Orden* v. *Perry*, 545 U.S. at 677 (2005) (plurality op.), and *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

In *American Atheists, Inc.* v. *Port Authority of New York & New Jersey*, 760 F.3d 227 (2d Cir. 2014), the Second Circuit applied the three-part *Lemon* test to hold that "The Cross at Ground Zero" housed in the September 11 Museum did not violate the Establishment Clause. *Id.* at 238; *id.* at 234 ("The Cross at Ground Zero thus came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons"). Likewise, the Sixth Circuit, in *ACLU of Kentucky* v. *Grayson County*, 591 F.3d 837 (6th Cir. 2010), applied *Lemon* to uphold the constitutionality of including the Ten Commandments in a historical display at the county courthouse. *Id.* at 856. Finally, in *American Atheists, Inc.* v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010), the Tenth Circuit applied an amalgam of the *Lemon* test and Endorsement test to strike down roadside crosses memorializing fallen Utah state troopers under the Establishment Clause. *Id.* at 1117; *cf. id.* at 1110 ("Thus, the pattern is clear: we will strike down laws other courts would uphold, and do so whenever a reasonably biased, impaired, and distracted viewer might confuse them for an endorsement of religion") (Gorsuch, J., dissenting from denial of rehearing en banc) (emphasis omitted).[8]

2. In contrast, other courts have followed *Van Orden*'s instruction that *Lemon* is "not useful in deal-

---

[8] The Ninth Circuit in *Trunk* v. *City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), applies a belt-and-suspenders approach, applying both *Lemon* and *Van Orden* to hold that a cross-shaped veteran's memorial built on public land was unconstitutional. *Id.* at 1105-06 (applying the "*Lemon* and *Van Orden* Frameworks").

ing with [this] sort of passive monument" and, instead follow the *Van Orden* plurality's historical analysis or evaluate the displays under "legal judgment" approach announced in Justice Breyer's concurrence. For example, in *ACLU Nebraska Foundation* v. *City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc), the Eighth Circuit applied *Van Orden* to uphold the constitutionality of a Ten Commandments monument that stood in Plattsmouth's Memorial Park. *Id.* at 776. Like *Van Orden*, the Eighth Circuit relied on two principal factors to uphold the monument against a First Amendment challenge: first, the "City's monument ha[d] a dual significance, partaking of both religion and government," and second, "decades passed during which the Ten Commandments monument stood in Plattsmouth's Memorial Park without objection." *Id.* at 778 ("[W]e cannot conclude that Plattsmouth's display of a Ten Commandments monument is different in any constitutionally significant way from Texas's display of a similar monument in *Van Orden*"); see also *Red River Freethinkers* v. *City of Fargo*, 764 F.3d 948, 950 (8th Cir. 2014) (upholding the constitutionality of a Ten Commandments monument sitting on the city's Civic Plaza based on the similarities between the monument and the monuments in *Van Orden* and *Plattsmouth*).[9]

---

[9] Similarly, the Fifth Circuit, in *Staley* v. *Harris County*, 461 F.3d 504, 505 (5th Cir. 2006), applied an "objective observer analysis" based on its reading of *McCreary* and Justice Breyer's concurrence in *Van Orden*, to hold that a monument to a "prominent" citizen that featured an open Bible violated the Establishment Clause. *Id.* at 505-06. Subsequently, the Fifth Circuit granted rehearing en banc, but then dismissed the appeal as moot because the display had been removed by the County. *See Staley* v. *Harris Cty.*, 485 F.3d 305, 307, 309 (5th Cir. 2007).

Review should be granted because there is conflict and confusion among the lower courts, both as to the appropriate Establishment Clause test for assessing the constitutionality of public displays, and regarding the manner in which the relevant factors in the competing tests should be applied.

B. The Decision Below Is Inconsistent With *Van Orden*.

The decision below also is inconsistent with the analysis in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), where this Court upheld the display of a Ten Commandments monument on the grounds of the Texas State Capitol. A plurality of the Court emphasized an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 686; *id.* at 689 ("[D]isplays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments"). Further, Justice Breyer, who provided the fifth vote in *Van Orden*, highlighted the specific history of the Ten Commandments display, which had "stood apparently uncontested for nearly two generations," *id.* at 704 (Breyer, J., concurring in judgment), and thereby illustrated that "as a practical matter of degree this display is unlikely to prove divisive," *id.*

Van Orden confirms that public displays that have a long-standing historical tradition enter court with a strong presumption of constitutionality even if those displays could be perceived as acknowledging religious practice. Here, the Memorial has stood for over 90 years without controversy or legal challenge. Though the Fourth Circuit dismissed that fact as "too simplistic," Pet. App. 20a, the length of time that a monument has gone without legal challenge "suggest[s] *more strongly than can any set of formulaic*

tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect," *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment) (emphasis added). These 90-plus years without controversy "suggest that the public visiting the [Veterans Memorial Park] grounds has considered the religious aspect of the [Memorial's] message as part of what is a broader moral and historical message reflective of a cultural heritage." *Id.* at 702-03.

C. Review Should Be Granted Because The Decision Below Calls Into Question The Legality Of Numerous Memorials Throughout The Nation.

Review also is warranted because the decision below calls into question the legality of numerous other public displays.

In response to arguments by *amici* that a decision to find the Memorial unconstitutional "would jeopardize other memorials across the Nation displaying crosses, laying waste to such memorials nationwide," Pet. App. 26a, the Fourth Circuit offered cold comfort. It stated that the decision here was "confined to the unique facts at hand," and then identified a hodgepodge of purported distinctions between the Memorial here and memorials in Arlington National Cemetery. *Id.* But the court below made clear that it was not "deciding or passing judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses." *Id.* at 26a n.16.

As Judge Niemeyer explained, the majority decision was a misstep because (i) *Van Orden* should not be read to prohibit "a secular memorial to the lives of

soldiers lost during war in service of the Nation," and (ii) the majority's decision "puts at risk hundreds, and perhaps thousands, of similar monuments." Pet. App. 97a. Moreover, the majority's *ad hoc* analysis underscores the need for a predictable standard for assessing the legality of public displays under the Establishment Clause rather than a test that allows a reviewing court to disclaim any application beyond the "unique facts at hand." *Id.* at 26a.

Review should be granted because the Fourth's Circuit's standard makes it make it well-nigh impossible for municipal attorneys to advise their clients regarding this recurring issue. *Cf. Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) ("The reason for my concern is that the instant decision . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only").

CONCLUSION

For these reasons, and those set forth in the Petitions, the Court should grant the petitions for a writ of certiorari.

Respectfully submitted,

PAUL J. ZIDLICKY
MICHAEL B. BUSCHBACHER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

July 27, 2018